



[2017] UKFTT 0635 (PC)

**PROPERTY CHAMBER, LAND REGISTRATION  
FIRST-TIER TRIBUNAL**

**REF/2016/0853**

**LAND REGISTRATION ACT 2002**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**BETWEEN:**

**MR BRUCE FORBES  
MRS ADELE LISA KELLY**

**Applicants**

**-and-**

**MRS JEAN MARTIN ECCLES  
MR GORDON ECCLES**

**Respondents**

**Property Addresses: (1) Woodend, Wranglebrook Road, Upton, Pontefract (WF9 1JU)  
and  
(2) Wranglebrook Club, Harewood Lane, Upton, Pontefract (WF9 1JX)**

**Title Numbers: WYK251574 and WYK860134**

**Before: Judge Jefferis**

**Site Visit 10<sup>th</sup> July 2017  
Hearing dates 11<sup>th</sup> and 12<sup>th</sup> July 2017**

**Sitting at Leeds Employment Tribunal,  
4<sup>th</sup> Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES**

**Applicants' Representation: Litigants in person  
Respondents' Representation: James Kenyon (McKenzie friend)**

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**ORDER**

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For the reasons given in the written decision of today's date.

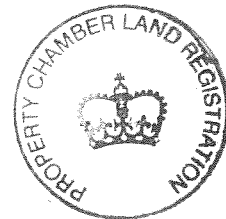
IT IS ORDERED THAT:

1. The Chief Land Registrar is directed to cancel the Applicants' application by Form AP1 dated 19<sup>th</sup> April 2017 to register the benefit and note the burden of a prescriptive right of way on foot and with vehicles over Title Number WYK860134 for the benefit of Title Number WYK251574.
2. The Applicants shall pay the Respondents' costs to be assessed on the Standard Basis if not agreed.
3. If the parties cannot agree as to the amount of such costs, an application for the costs to be assessed shall be made in writing to the Tribunal before 30<sup>th</sup> September 2017.

**Dated 21<sup>st</sup> July 2017.**

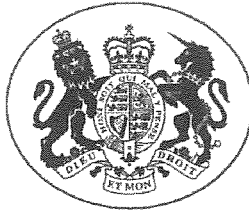
*Michael Jefferis*

**Michael Jefferis**



**Judge of the Property Chamber First-tier Tribunal**

**BY ORDER OF THE TRIBUNAL**



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Respondents' Representation: James Kenyon (McKenzie friend)**

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**DECISION**

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*Keywords*

*Application for prescriptive easement. Was the claim made out on the evidence? Effect of signage.*

Provisions, authorities etc considered

*The Prescription Act 1832*

*Winterburn v Bennett [2016] EWCA Civ 482, [2016] P & CR 11*

The Application

1. The Application was dated 19<sup>th</sup> April 2016. The Applicants applied to the Land Registry, on Form AP1, to register the benefit and note the burden of a prescriptive right of way on foot and with vehicles over their neighbour's land. The Applicants assert that the easement has arisen by long user, since 1972, by themselves and their predecessors in title. The Respondents objected to the application for a number of reasons. Most fundamentally, the Respondents assert that the Applicants and their predecessors in title have never exercised a right of access in the manner which the Applicants claim.

The Applicants

2. The Applicants are the registered proprietors, with Title Absolute, of a property known as Woodend, in Wrangbrook Road, Upton, near Pontefract, ("Woodend"). Their Title is registered with Title Number WYK251574.

The Respondents

3. The Respondents are the registered proprietors, with Title Absolute, of the neighbouring property known as Wrangbrook Club, in Harebrook Lane Road, Upton, near Pontefract. (I will use the global expression, "The Club", to refer to the property and each of the two clubs that have been on the site over the years). The Respondents' Title is registered, with Title Number WYK860134. There has been a club on "The Club" site for decades. The original club went into liquidation and the Respondents purchased The Club site and started a new club in 2011.

The Site

4. The site is best understood from the site plan annexed hereto, ("the Plan"). As you look at the properties on the Plan (i.e. looking North). The Club is on the left (i.e. to the West). The Club is shown on the Plan edged in red. Next to that is "Rainforth House", which is edged in dark blue on the Plan, ("Rainforth"). Then there is a property called "Nia-Roo". Woodend is on the right (i.e. to the East). Woodend is edged in green on the Plan.

### Woodend

5. Woodend is a large house, formerly used, in part, as a surgery. It has a footpath down its East side leading to the “front” door that is in current use. Woodend has a driveway down the West side of the house running down to the rear garden. On the day of my site visit, there was a car parked in this side passageway and there was space to walk either side of the car. Woodend has a small area of hardstanding next to the road in front of the house. It has a garage giving onto this hardstanding. Rainforth and Nia-Roo do not have such deep plots as Woodend and The Club. This means that Woodend and The Club have a common boundary, which lies to the South of Nia-Roo.

### The Access and car park

6. There is an area of hardstanding between the front line of The Club building and the road. This area is used for access and as a car park. This hard surface also runs down the West side of The Club, to near the back of its site. The hardstanding is only partly within The Club’s Title. This is the part shown coloured pink and the part shown uncoloured on the Plan. The other part of the hardstanding is within the Title to Rainforth. That part of the hardstanding is shown in pale blue on the Plan. There is no physical barrier between the land coloured pink on the Plan (“the Pink Land”) and land shown coloured light blue on the Plan, (“the Blue Land”).

### The right of way claimed

7. The right of way claimed in the Applicant’s application is: “A right of way at all times with or without vehicles for the benefit of Woodend over land at Wrangbrook Club”. The Applicants’ application to the Land Registry was supported by two signed forms ST4. The first in time was made by Mrs Shirley Bell and was dated 29<sup>th</sup> March 2016. The second was made by the Second Applicant, Mrs Adele Kelly, and was dated 5<sup>th</sup> May 2016. Shirley Bell was one of the two immediate predecessors in title to Woodend. Each ST4 had a plan annexed to it. On the ST4 plan, the area covered by right of way, as claimed, was shown in pink, in the same way as it is shown on the Plan. Thus, the right of way is claimed over the Pink Land.

### The Site Visit

8. On the 10<sup>th</sup> July 2017, I attended a site visit, in the presence of the parties. We viewed the site and, in particular, the place of the alleged access through the common boundary,

from both sides of the fence. I invited each of the parties to point out any physical features which they wished me to note. I did not allow evidence to be given on site but I was told by Mr Forbes that the front of The Club site had been tidied up and “strimmed”, just before my visit. This was accepted by the Respondents. Nevertheless, there was a significant growth of weeds and some self-sown saplings growing on The Club’s side of the alleged access. There was no evident sign of regular use with vehicles or on foot. The fence at this point was different to the rest of the Applicants’ boundary fence. Two panels were screwed in place, with retaining screws on both sides of the fence. The rest of the Applicants’ boundary fence had round topped wooden panels and these two were straight topped panels. There were two round topped panels leaning against the fence, further down the Applicants’ garden, which it appeared could be used to complete the boundary with matching fence panels in place of the temporary ones.

#### The Hearing

9. The Applicant’s acted in person throughout the hearing and each gave oral evidence. The Respondents were helped by Mr James Kenyon as a “McKenzie friend”. They too both gave evidence. The Respondents called three witnesses. The hearing lasted a day and a half.

#### Mrs Bell’s ST4

10. Box 10 of Mrs Bell’s ST4 contained the following:  
“Details of user:  
My husband Reginald Bell and I exercised a right of way on foot and with vehicles over the land tinted pink on the plan attached herewith with respect to the owners of Wrangbrook Club and without aggression on almost a daily basis from when we first moved into Woodend as tenants in 1972 to 2013 when we sold Woodend.”
11. Box 11 of Mrs Bell’s ST4 contained the following:  
“Period of user:  
1972-2013 continuously. House occupied as tenants in 1972, purchased in 1982 and still occupied by us, sold in 2013 to the current registered proprietors.”

Mrs Kelly's ST4

12. Box 10 of Mrs Kelly's ST4 contained the following:

"Details of user:

My partner Bruce Forbes and I have exercised a right of way on foot and with vehicles over the land tinted pink on the plan attached herewith with respect to the owners of Wrangbrook Club on an almost daily basis from 05-07-2013 when we purchased and moved into Woodend."

13. Box 11 of Mrs Bell's ST4 contained the following:

"Period of user:

05-07-2013 – present day".

It was dated 5<sup>th</sup> May 2016, so "present day" meant 5<sup>th</sup> May 2016.

14. The Applicants' Statement of Case was in a rather summary form. It was essentially a list of bullet points. The original copy did not have a Statement of Truth. Another copy, with a Statement of Truth, was filed late, after complaint from the Respondents. The Applicants did not file separate Witness Statements setting out their evidence in full detail.

The Applicants' oral evidence

15. The Applicants' oral evidence was as follows. When they moved in, there were a pair of old gates at the access point into their rear garden. These gates were at the Northern end of their common boundary with The Club. They did not describe the gates, save to say they were in poor condition and needed replacing. They promptly took down the gates and replaced them with two temporary fence panels, which were screwed in place. They had planned install new electrically operated metal gates but this had to be put on hold as a result of the dispute. Relatives of the Applicants, coming to stay with them, did gain access to their garden with a vehicle on a few occasions. At least one skip was delivered to their garden in 2013 but a skip delivery was prevented by persons protecting The Club's interest in 2015. They were told there was a dispute over access during the time when Mr and Mrs Bell owned Woodend and a Solicitor's letter was written on the Bells' behalf, which ended the dispute. The Applicants were, however, unable to produce a copy of any such letter. I will return to their evidence later.

### Other evidence in support of the Applicants' Application

16. The Applicants relied on other items of evidence, including the following:-

- (1) The ST4 from Mrs Bell, which is referred to above.
- (2) A letter from Connie Biglan, who lives in Nia-Roo. This was addressed to the "Land Registry Tribunal" and dated 4<sup>th</sup> April 2017. It bore a Statement of Truth and was signed. The letter supported the key elements of the Applicants' case as to the position prior to the Applicants' purchase of Woodend. Connie Biglan asserted that a right of way had been exercised to Woodend daily from 1972 to 2013, albeit she stated that she had lived at Nia-Roo only since 1974. Connie Biglan stated there were gates, before the temporary fence panels were put in their place. Connie Biglan was not called to give evidence.
- (3) A full-page copy of a colour aerial photograph from Google. This bore two printed dates, 1999 and 2009. The First Applicant asserted that this photo was taken in 2009. The explanation for the earlier date was that there was another photo, the first of a series, which was taken in 1999. The full-page colour photo was in the bundle produced by the Applicants at the hearing and had a manuscript date written on it of 1999. A smaller, less clear, copy had been produced before the hearing. The photo appeared to show a car in the rear garden of Woodend, near to where the Applicants stated there had been a pair of gates. Mr Forbes asserted that one can see vehicle tracks on this colour photo, between that car and the boundary, but I cannot see any such apparent tracks on the photo. Mrs Kelly asserted that the car could not have reached the rear garden down the passageway down the West side of Woodend, as there was a tree in the way in the back garden. It is not clear from the photograph whether access could have been gained via the side passageway, nor was this demonstrated to me on the site visit. That said, I did see a tree stump in about the position of the tree in the photo.
- (4) A number of Police reports. These evidenced a number of unfortunate and unpleasant incidents, apparently involving club members, but the reports did little more than explain why the Applicants gave up trying to use the asserted right of way.





Sorry I can't find the correspondence regarding this. S.H Bell

To WMDC a few years ago regarding the Wrangbrook W.M. Club placing a changing room portacabin adjacent to RT perimeter fence with windows overlooking garden. Subsequently the said club had to build a fence to obscure windows. This has (the portacabin) since been removed."

"8.2 Does the property benefit from any formal or informal arrangements over neighbouring property? If yes, please give details:  Yes  No

Double gates on right rear garden lead onto land which has a right of way for the public to access Upton Country Park (old Upton Colliery premises). The gates have been used regularly by us since 1972 and from 1959 by other owners. The land/right of way is adjacent to the Wrangbrook W.M. Club".

This suggests that the main part of the route from the road was allegedly being travelled in the exercise of what was believed to be a public right of way, rather than a private right of way.

"8.4 Has anyone taken steps to prevent access to the property, or to complain about or demand payment for access to the property? If yes, please give details:  
Yes  No

This box for an answer was left blank.

- (6) The Applicants also relied on two copy invoices for skips, which were in their bundle produced at the hearing. The invoices were from Askew Skips. It was common ground that this is a local skip firm. The copy invoices were not ideal in evidential terms. Each is marked, in manuscript, at the top "Duplicate Copy". The Applicants explained that the original invoices had been lost by their accountant and he had to obtain duplicates. The first, in date order, is one dated "4/8/13". It appears, however, that this date has been changed, as parts of the line underneath the "4" and the "8" have been erased and one can see traces of other writing. On the line above this date "4/8/13", one can see "8/4/", with the word "Monday" written over it. It might be the writer started to put the date on the line for the day

of the week and transposed the “4” and the “8” in doing so. The writer may then have written the same wrong date “8/4” on the next line and corrected it to “4/8”. That would be one explanation. In any event, Mrs Kenny accepted that they had not moved into Woodend by April 2013. They completed and moved on 5<sup>th</sup> July 2013. Mrs Kelly also accepted that the 8<sup>th</sup> August 2013 was a Sunday, not a Monday. Mrs Kenny suggested that it may be that the skip was delivered on a Sunday. The second copy invoice was dated 26<sup>th</sup> February 2015. This was the one for the skip that was turned away.

#### The Respondents’ evidence

17. The Respondents filed a number of signed statements from members of The Club. These bore Statements of Truth. The statements were to the effect that there had never been access by the Applicants or their predecessors over The Club. At the hearing, the Applicants themselves gave evidence and they called three of The Club members to give oral evidence.
  - (1) Brian Cooper’s evidence was as follows. He had been a member of The Club since 1980. He had been a Committee member and a Trustee. He had never seen the alleged access being used. He had never seen vehicles coming in and out. There had always been a wooden panel fence along the boundary. The fence was roughly six-foot high. He never witnessed any gates. He never saw any tracks or tyre marks. Under cross examination, he stated that he had never seen a car in the back garden of Woodend or a caravan going in that way. He said he goes to The Club for a drink every weekend. He accepted that he would not see what happened on weekdays, in the daytime. In re-examination, he stated that he often used to chop firewood (for the wood burner in The Club) near the alleged point of access but never saw any signs of access.
  - (2) Andrew Armstrong’s evidence was this. He had been a member of The Club for 33 years. He had been the secretary of the football club there for 25 years. The football club used a portacabin on the boundary to store their equipment, like the goalposts. He had been a trustee of the former club on The Club site and, as such, he had executed the transfer to the Respondents. When football was being played on Wednesdays and Saturdays, the car park was full and access to Woodend

through the car park would not have been possible. He always remembered a fence all along the boundary between The Club and Woodend. About 15 years ago he and other members of The Club replaced that fence. They had joiners and builders, and were “quite handy people”. The fence was continuous. It was behind the portacabins, looking at it from The Club’s side. He gave unchallenged evidence that there had been signs on the front wall of The Club building for a “long, long time”. For 30 years, as far as he knew. When the signs became dilapidated the signs had been renewed. The signs read: “This car park is for the use of patrons only”. He had grown up locally and knew the site as a child. He was a paper boy. Papers were stored in a building within what is now the parking area. He had never seen any gates into Woodend. There was a fence. There had never been access there. No one had ever been to Woodend that way. Andrew Armstrong, in particular, came across as a firm, clear witness of truth.

- (3) Brian Jones’s evidence was this. He was born in 1943. He had been a club Member since 1961. That is 56 years. His mother was at one time a housekeeper for Dr Armitage, who was then the owner of Woodend. He knew Woodend well and went into the back garden “loads of times”. He did not recollect any gates, only a fence. He never saw anyone drive or walk through the car park to Woodend. He too helped with the wood for the wood burner. Under cross examination, he said that he remembered Dr Armitage’s Jaguar motor car. Dr Armitage never took it in the rear garden. Dr Armitage used to park his Jaguar in the garage at the front, (by the road). Dr Armitage used to jump in his car and be up the road in no time.
- (4) The second Applicant, Mrs Eccles gave clear evidence that she had never seen any gates on the boundary or anyone using the alleged right of way. She had never seen the Applicants, until my site visit. She knew of the incident when a skip lorry was turned away. When the car park was full, it would not be possible to gain access to the rear garden of Woodend through the car park. They had never been asked to move a car, to allow access to Woodend. It would not be possible to drive over the Pink Land because the staff habitually park in front of The Club and there is a flagpole in front of The Club. Her evidence was that she had run the new club for some years, and returned to run it when a tenant had left, so she had

been on site regularly. She was also the responsible person in licensing terms, so that she was informed of any incidents.

- (5) The First Applicant, Mr Eccles, whilst apparently truthful, was not a good witness because he seemed to have very little independent recollection of dates and key events. The only thing he was clear about was this. He has bought a number of properties and he always checks the boundaries when he purchases. He did so in this case and there was nothing to suggest there was an access into Woodend or that such an access had been used.

#### Conflict of evidence

18. From the start to the end of this case there has been a stark conflict of evidence. The Applicants' case is that there were gates and there was almost daily use of a right of way on foot and with vehicles until 2015. The Respondents' case is that there was a tall wooden fence along the whole boundary which was replaced when it fell into disrepair. They never saw any gates or any use of the alleged right of way. Indeed, access was impossible along the route claimed due to obstacles. In reaching a conclusion, as to what is established on the balance of probabilities, I take into account all the evidence before me in the documents and the oral evidence given during the hearing but certain points are worthy of special mention.

#### The route used

19. When cross-examined, the First Applicant, Mr Forbes, accepted that they did not exercise the right of way over the Pink Land. As they drove in, they naturally drove on the left side of the entranceway. That is to say, over the narrow Northern part of the Blue Land, unless there were cars parked on it. They did not then go right down to the front of The Club building and do a 90 degree turn, (to follow the Pink Land). They cut across the Southern part of the Blue Land. The Second Applicant accepted this was correct. Thus, on the Applicants' own case, the right exercised was not over the Pink Land but over the Blue Land, save right at the end, near the boundary between The Club and Woodend. This is not a matter of mere form. It is a matter of substance. The application to the Land Registry related to the Pink Land only. The Blue Land is in a different title. The application does not relate to the Blue Land. The Blue Land is owned by a company, which is not a party, albeit that the Respondents are its shareholders.

20. I should add that the Applicants were cross examined about the existence of a flag pole, which is set in the ground in front of The Club building, and a large colliery wheel on a stand in front of The Club building. Scaling the plans attached to the ST4s and measuring the distance between the front wall of The Club and these obstructions suggested that what was left of the Pink Land along the front of The Club building would have been very narrow for practical use with a car. Mr Kenyon's plan "RD1A" was marked with pre-metric measurements. The Pink Land was shown as scaled at 11 feet 4 inches wide and the flag pole 4 feet from the front of the building. This left just 7 feet 4 inches for the alleged access. These measurements were not challenged. Further, there was evidence from the Respondents, which the Applicants accepted, that staff of The Club and its members habitually parked in front of The Club building, blocking use of the Pink Land for access to Woodend.

#### Actual use

21. Under questioning from Mr Kenyon, the Second Applicant accepted that she had never exercised the right of way on foot or with vehicles, since the Applicants purchased Woodend. It was also common ground that the right of way with vehicles had not been exercised since a skip delivery was turned away in February 2015. That is more than a year before Mrs Kenny's ST4 of 5<sup>th</sup> May 2016, asserting continued use. These two points are in sharp contrast with what she stated on her ST4, quoted above. She frankly explained this in the following way. The ST4 for Mrs Bell was settled by a Solicitor. Mrs Kelly's ST4 followed the same wording. A Solicitor had been paid to do the paperwork and she relied on the Solicitor to get it right. Thus, she signed a statement that was materially untrue and despite the warning at the end of the ST4 that to knowingly make a false statement may be a criminal offence. The Second Applicant referred to occasional use of the access by members of the family and at least one skip lorry back in 2013. He also walked through The Club to the playing fields behind, to exercise his dog, but that was not to gain access to Woodend.

#### Legal Implications

22. There was a break in any user for over a year before this case came to the Tribunal. In my judgment, that precludes a claim under the Prescription Act 1832. This is not a case of user since time immemorial, so a claim under the Common Law cannot be made out.

The Applicants therefore have to rely on the doctrine of lost modern grant. For this, they have to establish a period of user of 20 years, any period of 20 years will suffice. The user has to be without force, without secrecy and without permission. It is common ground there was no permission. In my judgment, if a right had been established prior to 13<sup>th</sup> October 2003, it would have been an overriding interest and could have been protected by Schedule 3, paragraph 3 of the Land Registration Act 2002 or the transitional provision in Schedule 12, paragraph 9, of the Land Registration Act 2002.

23. I am not satisfied, on the balance of probabilities that there was a period of 20 years user over the Pink Land. Indeed, on the balance of probabilities, I am satisfied that there was no such 20 year period of user. To mention the key points:
- (1) On the Applicants' own evidence, their user was not over the Pink Land but mostly over the Blue Land.
  - (2) The route over the Pink Land was seriously impeded by the flag pole and would have habitually been blocked by parked cars in front of the clubhouse.
  - (3) I accept the oral evidence of the three club members, which was tested in cross examination, that there were no gates or apparent user, or signs of user, for decades. Had user been anything like as frequent, or of such long duration, as the Applicants' assert, it surely would have been seen by these three club members.
  - (4) I accept the evidence of Mr Armstrong that they erected a fence all down the common boundary. I was, at first, sceptical that the Club would have fenced behind the portacabins but Mr Armstrong was firm in his evidence that they did so. His evidence in this regard is corroborated by the answer to question 3.1 on the Property Information Form: [letter] "To WMDC a few years ago regarding the Wrangbrook W.M. Club placing a changing room portacabin adjacent to RT perimeter fence with windows overlooking garden. Subsequently the said club had to build a fence to obscure windows."
  - (5) There was a remarkable discrepancy between the key contents of Mrs Kelly's ST4 (filed on behalf of both Applicants), and her oral evidence. Given this discrepancy, where there is a conflict of evidence between the parties, I have to carefully consider what weight to give the Applicants' evidence.
  - (6) The Doctor used to keep his Jaguar motor car in the garage in the front of Woodend by the road, not in the rear garden.

- (7) If a letter had been written by Solicitors acting for Mr and Mrs Bell to The Club's owners about the right of way, then it should have been mentioned on the Property Information Form at questions 2.1 and 8.4 but it was not.
- (8) The two clearly visible signs on the façade of The Club building prevented the user being "as of right", see (Winterburn v Bennett [2017] 1 WLR 646). The First Respondent noticed the signs but thought they had nothing to do with the right of way. In my judgment, he was incorrect and the signs alone could have been determinative of the application.

### Conclusion

24. Taking all matters into consideration, the claim to an easement fails and I propose to direct the Chief Land Registrar to cancel the Applicants' application to register and note a prescriptive easement.

### Costs

25. At the conclusion of the hearing, I canvassed with the parties the question of costs. I explained that the usual rule is that "costs follow the event". That is to say, that the loser is ordered to pay the winner's costs to be assessed by the Tribunal if not agreed. Both sides accepted that was appropriate in this case and that there is nothing to take this case outside the normal rule. Accordingly, I will make a costs order against the Applicants in favour of the Respondents, to be assessed by the Tribunal if not agreed. As the Respondents were represented by a McKenzie friend who, (whilst very able) was not legally qualified, the costs should be relatively modest. It is to be hoped that costs can be agreed, to save further costs being incurred in arguing over costs.

### One positive outcome

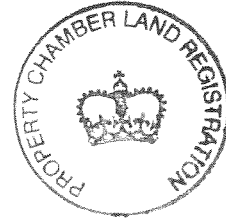
26. One heartening feature in this case is what happened at the end of the hearing. Mrs Eccles was clearly moved by the problems which Mrs Kelly described of anti-social behaviour by club members. Mrs Eccles said that, if Mrs Kelly had problems with what was going on at The Club or needed to discuss something, then Mrs Kelly should contact her directly. Mr Eccles and Mrs Kelly exchanged telephone numbers and agreed to liaise in future over any problems. I sincerely hope that this heralds a new era of good neighbourly relations between the parties.



Dated 21<sup>st</sup> July 2017.

*Michael Jefferys.*

Michael Jefferys



**Judge of the Property Chamber First-tier Tribunal**

**BY ORDER OF THE TRIBUNAL**

